

TITLE VII ANTIRETALIATION:
THE UNITED STATES SUPREME COURT'S DECISION IN
*CRAWFORD V. METROPOLITAN GOVERNMENT OF NASHVILLE
& DAVIDSON COUNTY, TENNESSEE* ON THE SCOPE OF THE
OPPOSITION CLAUSE

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I. INTRODUCTION

Congress passed the Civil Rights Act of 1964 to eliminate race discrimination.¹ The statute's prohibition on sex discrimination was added as an "eleventh-hour amendment in an effort to kill the bill."² The effort failed, and the bill quickly passed as amended, leaving little legislative history to aid the judicial system's interpretation of the Act.³ Thus, courts have had to develop their own rationales to interpret the statute, leading to disparate outcomes among the respective circuits and slow progress as the Supreme Court creates new precedent one factual scenario at a time.⁴

This Note discusses the interpretation of the opposition clause within Title VII of the Civil Rights Act of 1964⁵ in the context of *Crawford v. Metropolitan Government of Nashville & Davidson County, Tennessee*.⁶ In general, the opposition clause protects an employee from retaliation by his employer if he opposes his employer's illegal conduct.⁷ Part II summarizes the facts and the holding of *Crawford*. Part III describes Title VII discrimination in general and antiretaliation in particular. Part IV discusses the United States Supreme Court's rationale in *Crawford*, and Part V questions the interpretation of the opposition clause. Finally, Part VI agrees

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1. 42 U.S.C. § 2000d (2006).

2. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 767 n.1 (1998) (Thomas, J., dissenting).

3. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986).

4. *See id.*

5. 42 U.S.C. § 2000e-3(a) (2006).

6. *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846 (2009).

7. 42 U.S.C. § 2000e-3(a) (2006).

with the result in *Crawford*, but disagrees with the extension of the opposition clause.

II. FACTS AND HOLDING

In 2002, the Metropolitan Government of Nashville and Davidson County, Tennessee (“Metro”) initiated an internal investigation in response to rumors of sexual harassment by the Metro School District’s employee relations director, Gene Hughes.⁸ Human resources questioned Vicky Crawford, a Metro employee, about whether she had witnessed “inappropriate behavior” by Hughes.⁹ Crawford described several instances of questionable behavior.¹⁰ Metro took no action against Hughes, but fired Crawford and two other interviewees after concluding its investigation.¹¹ Crawford filed suit in the United States District Court for the Middle District of Tennessee and filed a Title VII violation charge with the Equal Employment Opportunity Commission (“EEOC”), alleging that Metro retaliated against her for her accounts of Hughes’ behavior.¹²

The District Court granted Metro’s motion for summary judgment, holding that since Crawford had not initiated the complaint against Hughes, she did not satisfy the opposition clause.¹³ Furthermore, the District Court held that Crawford had “merely answered questions by investigators in an already-pending internal investigation, initiated by someone else.”¹⁴ The Sixth Circuit affirmed for the same reasons.¹⁵ Specifically, the Sixth Circuit held that the opposition clause “demands active, consistent, ‘opposing’ activities to warrant... protection against retaliation,”¹⁶ whereas Crawford did “not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action

8. *Crawford*, 129 S. Ct. at 849.

9. *Id.*

10. *Id.* (describing how Hughes responded to “‘Hey Dr. Hughes, what’s up?’ by grabbing his crotch and saying ‘[Y]ou know what’s up’; he had repeatedly ‘put his crotch up to [her] window’; and on one occasion he had entered her office and ‘grabbed her head and pulled it to his crotch.’”).

11. *Id.* Metro claimed the reason for Crawford’s dismissal was for embezzlement. *Id.*

12. *Id.* at 849–50.

13. *Id.* at 850.

14. *Id.*

15. *Id.*

16. *Crawford v. Metro. Gov’t of Nashville & Davidson County, Tenn.*, 211 Fed. App’x 373, 376 (6th Cir. 2006), *rev’d*, 129 S. Ct. 846 (2009) (quoting *Bell v. Safety Grooving & Grinding, LP.*, 107 Fed. App’x 607, 610 (6th Cir. 2004)).

following the investigation and prior to her firing.”¹⁷ Crawford appealed.¹⁸ The United States Supreme Court reviewed the case and, on January 26, 2009, held that the antiretaliation provision of Title VII protects an employee who communicates discrimination by answering questions during an employer’s internal investigation.¹⁹ The Court found that the antiretaliation provision does not require an employee’s opposition to be active and purposive.²⁰

III. BACKGROUND

The antiretaliation provision of Title VII of the Civil Rights Act of 1964 contains two clauses that state:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants... [1] because he has opposed any practice made an unlawful employment practice by this subchapter, or [2] because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.²¹

Provision one is known as the “opposition clause,” and provision two is known as the “participation clause.”²² Not only is there little legislative history regarding the prohibition of sex discrimination because of the hasty amendment, but the statute also fails to define many terms, such as “oppose” and “investigation.”²³

Thus, the courts have had little guidance from Congress as to the extent to which the statute applies, as well as the meaning of the antiretaliation provision.²⁴ Accordingly, this section examines the development of the current incentive scheme for employers to prevent discrimination. This section begins by reviewing the decision in *Rogers v. EEOC*, the first case to recognize a cause of action based upon a racially discriminatory work

17. *Id.*

18. *Crawford*, 129 S. Ct. at 850.

19. *Id.* at 849, 851–52.

20. *Id.* at 849.

21. 42 U.S.C. § 2000e-3(a) (2006).

22. *Crawford*, 129 S. Ct. at 848.

23. 42 U.S.C. § 2000e (2006). This Note only discusses the definition of “oppose” and not “investigation.”

24. *Meritor Sav. Bank*, 477 U.S. 57, 64 (1986).

environment.²⁵ It then discusses the Supreme Court's decision in *Meritor Savings Bank v. Vinson*, which extended the *Roger*'s holding to include sexual harassment under a hostile work environment and held that principles of agency theory would determine whether or not an employer was liable for a discriminatory work environment.²⁶ Next this section reviews the holdings of *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*, which appended an affirmative defense for employers in concordance with the holding in *Vinson*.²⁷ Finally, this section will discuss the split among circuit courts as to the interpretation of "opposition" and the guidelines presented by the EEOC.

A. Employer's Liability for Discriminatory Work Environment

Before *Rogers v. EEOC*, employers were liable only when an employee suffered a tangible economic loss because of discrimination.²⁸ Therefore, to avoid liability, employers had an incentive only to prevent discrimination from affecting an employee's monetary interest.²⁹ In 1971, the Fifth Circuit, in *Rogers*, interpreted Title VII to include protection for employees from a discriminatory work environment.³⁰ The *Rogers* court relied upon the Title VII provision stating, "it shall be an unlawful employment practice for an employer... 'to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'"³¹ In *Rogers*, Josephine Chavez, a Spanish woman, worked for S. J. and N. Jay Rogers, optometrists, and alleged discriminatory employment practices by the Rogers, who segregated his patients and allowed seven Caucasian workers to "abuse" her.³² The District Court held that the fact that the employee merely felt uncomfortable in her work environment did not qualify her as a "person aggrieved"³³ under Title VII.³⁴ The Fifth Circuit reversed,

25. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *superseded by statute*, Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 109, *as recognized in* *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984); *see also* *Vinson*, 477 U.S. at 65–66.

26. *Vinson*, 477 U.S. at 67, 72.

27. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

28. Konrad S. Lee, "When Johnny Comes Marching Home Again" Will He Be Welcome at Work?, 35 PEPP. L. REV. 247, 260–61 (2008).

29. *Id.* at 261.

30. *Rogers*, 454 F.2d at 238.

31. *Id.* (quoting 42 U.S.C. § 2000e-2(a)(1) (2006)).

32. *Id.* at 236.

33. 42 U.S.C. § 2000e-5 (2006) (defining an aggrieved person as one who is able to bring a claim for unlawful employment practices).

reasoning that the work environment can be “so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers”³⁵ and that such treatment would alter the “terms [and] conditions” protected by the Civil Rights Act of 1964.³⁶ But the court stated that a mere utterance of an epithet that may offend was insufficient to violate the Act.³⁷ By holding so, the Fifth Circuit expanded Title VII to include harassment, or hostile work environment, as a form of discrimination.³⁸

It was not until 1986 in *Meritor Savings Bank v. Vinson* that the United States Supreme Court officially recognized that Title VII protected employees from sexual harassment.³⁹ In *Vinson*, a former bank employee brought an action against the bank and her supervisor, alleging that during her employment she had been subjected to sexual harassment by the supervisor.⁴⁰ She asserted that the supervisor repeatedly made demands for sexual favors, exposed himself, and even forcibly raped her on several occasions.⁴¹ She also testified that the supervisor fondled and touched other women employees.⁴² The Court noted that ever since the *Rogers* decision many circuits had relied on its rationale to adopt harassment as a valid claim under the Act to protect race, religion, and national origin and that nothing in Title VII suggested that freedom from sexual harassment should not also be protected.⁴³ Thus, the Court, following *Rogers*’ lead, held that “[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.”⁴⁴

Vinson, however, is not only significant for recognizing sexual harassment as actionable, but also for ruling that agency principles would apply in determining whether or not an employer would be vicariously

34. *Rogers*, 454 F.2d at 237.

35. *Id.* at 238.

36. *Id.*

37. *Id.*

38. Lee, *supra* note 28, at 260.

39. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986).

40. *Id.* at 60.

41. *Id.*

42. *Id.*

43. *Id.* at 66; *see also* *Cariddi v. Kan. City Chiefs Football Club, Inc.*, 568 F.2d 87, 88 (8th Cir. 1977) (recognizing national origin harassment); *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 549 F.2d 506, 514–15 (8th Cir. 1977) (recognizing racial harassment); *Gray v. Greyhound Lines, E.*, 545 F.2d 169, 176 (D.C. Cir. 1976) (recognizing racial harassment); *Compston v. Borden, Inc.*, 424 F. Supp. 157, 161 (S.D. Ohio 1976) (recognizing religious harassment).

44. *Vinson*, 477 U.S. at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

liable for the sexual harassment, thereby creating an incentive for employers to regulate employees' conduct toward one another.⁴⁵ The District of Columbia Circuit held that an employer was absolutely liable for sexual harassment conducted by a supervisor regardless of whether the employer knew or should have known about the misconduct.⁴⁶ That decision relied on Title VII's definition of "employer" which included "any agent of such a person."⁴⁷ The Circuit Court theorized that a supervisor is an agent of the employer, and though he may not have the authority to hire, fire, or promote, "the mere existence... of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose on employees."⁴⁸ At the Supreme Court level, the EEOC, as *amicus curiae*, submitted a brief arguing that the Court should follow agency principles and find that when a supervisor uses the authority delegated by the employer to harass employees then the employer should be strictly liable.⁴⁹ The EEOC further argued that when a sexual harassment claim based on hostile environment is brought, agency principles dictate a rule that rests on whether the employee had reasonable channels to complain of the harassment and, if used, whether the employer reasonably interceded.⁵⁰ The Supreme Court noted that the EEOC's arguments contradicted its own guidelines.⁵¹ For example, the EEOC held an employer liable for the acts of its agents without regard to notice, but also requires an examination of the circumstances to determine the particular relationship as a supervisor or agent.⁵²

The Court, however, declined to issue a definitive rule as to employer liability, but it did agree that Congress wanted courts to utilize agency principles for direction.⁵³ It opined that Congress defined "employer" to include any "agent" of the employer, suggesting the intention to limit an employer's liability regarding some acts by employees.⁵⁴ The Court also stated that neither the existence of a grievance procedure nor the absence of notice of the harassment by a supervisor would be cause for absolute immunity for the employer while the opposite would not equal automatic

45. *See id.* at 73.

46. *Id.* at 63.

47. *Id.* (quoting 42 U.S.C. § 2000e(b) (2006)).

48. *Id.*

49. *Id.* at 70–71.

50. *Id.* at 71.

51. *Id.*

52. *Id.* (citing 29 C.F.R. § 1604.11(c) (1985)).

53. *Id.* at 72.

54. *Id.*

liability either.⁵⁵ Thus, the Court reversed the Circuit Court's holding that employers are absolutely liable for its supervisors' sexual harassment and instead ruled that courts should use agency principles to aid in determining an employer's liability.⁵⁶

In the wake of *Vinson*, the courts were again left with little guidance as to the extent of employer liability regarding sexual harassment, resulting in different approaches among the courts.⁵⁷ The disparity among the courts naturally caused confusion for employers in developing preventive schemes, and in response, the EEOC released a policy statement encouraging employers to construct a complaint procedure "designed to 'encourage victims of harassment to come forward' [without requiring] a victim to complain first to the offending supervisor."⁵⁸ The Supreme Court in 1998 decided to construct a more uniform and predictable federal standard to reconcile the circuits and the EEOC.⁵⁹ The cases of *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton* both involved the issue of vicarious liability for sexual harassment claims and were decided by the Supreme Court on the same day.⁶⁰ Since the reasoning and holdings are similar, they will be discussed together.

In *Ellerth*, the plaintiff-employee quit her job after fifteen months as a salesperson for her employer because she alleged to have repeatedly been the victim of sexual harassment by one of her supervisors.⁶¹ Her supervisor was a manager who had authority to hire and promote employees.⁶² The

55. *Id.*

56. *Id.* at 72–73 (citing RESTATEMENT (SECOND) OF AGENCY § 219 (1958)).

57. Compare *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1446 (10th Cir. 1997) (holding that an employer could be liable for a supervisor's hostile work environment sexual harassment under Title VII based on respondeat superior, actual knowledge, apparent authority, or delegated authority to control plaintiff's work environment which aided in the harassment), and *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir. 1994) ("We hold that an employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship."), with *Gary v. Long*, 59 F.3d 1391, 1398 (D.C. Cir. 1995) ("[A]n employer may not be held liable for a supervisor's hostile work environment harassment if the employer is able to establish that it had adopted policies and implemented measures such that the victimized employee either knew or should have known that the employer did not tolerate such conduct and that she could report it to the employer without fear of adverse consequences.").

58. EEOC, Policy Guidance on Current Issues of Sexual Harassment (Mar. 19, 1990), <http://archive.eeoc.gov/policy/docs/currentissues.html> (last visited Mar. 15, 2010) (quoting *Vinson*, 477 U.S. at 73).

59. *Faragher v. City of Boca Raton*, 524 U.S. 775, 785–86 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754–55 (1998).

60. *Faragher*, 524 U.S. at 775, 780; *Ellerth*, 524 U.S. at 742, 746–47.

61. *Ellerth*, 524 U.S. at 747–48.

62. *Id.* at 747.

employee testified to multiple occasions of offensive remarks and gestures made by her supervisor and to three specific instances where her supervisor threatened to deny her tangible job benefits.⁶³ She refused all of her supervisor's advances without suffering tangible retaliation, and despite her knowledge of her employer's policy against harassment, she never reported the misconduct.⁶⁴

In *Faragher*, the employee, Beth Ann Faragher, worked for the city as a lifeguard and alleged that her supervisors sexually harassed her.⁶⁵ One supervisor, Terry, allegedly touched her body without invitation, wrapped his arms around her with his hand on her buttocks, insulted Faragher on her shape, and made crude references to women.⁶⁶ During an interview with an applicant, Terry said that female lifeguards had sex with the males and asked if she would too.⁶⁷ Faragher's other supervisor, Silverman, also allegedly engaged in sexual harassment.⁶⁸ Silverman tackled Faragher and stated that, if not for a certain physical characteristic of hers, he would have sex with her.⁶⁹ He pantomimed oral sex, made vulgar remarks to women, commented on female lifeguards' bodies, and told them he would like to have sex with them.⁷⁰ Faragher failed to complain to higher management about Terry or Silverman's actions.⁷¹

As previously stated, the goal of both opinions was to construct a uniform standard that courts could use in order to create a consensus in the circuits.⁷² To do so, the Supreme Court turned to the concept of vicarious liability, noting that some of the circuits had relied on various types of agency principles and rationales to hold that whenever a supervisor was the tortfeasor, the employer would automatically be vicariously liable based on a proxy theory.⁷³ The proxy theory rationalizes that when a supervisor

63. *Id.* at 747–48.

64. *Id.* at 748–49.

65. *Faragher*, 524 U.S. at 780–81.

66. *Id.* at 782.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 785–86; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754–55 (1998).

73. *Faragher*, 524 U.S. at 790–91; *see, e.g., Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 19, 23 (1993) (finding that president of corporate employer may be treated as the organization's proxy); *Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559, 564 (8th Cir. 1992) (holding employer liable where harassment was committed by owner).

conducts harassment using the authority delegated by his employer, his conduct becomes that of the employer because the supervisor could not have harassed without such delegation of power.⁷⁴ Other circuits, however, used the Restatement of Agency, cited in *Vinson*, to determine whether an employer should be vicariously liable for sexual harassment.⁷⁵ The Restatement states that “[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment.”⁷⁶ Intentional torts are typically not considered to be within the scope of employment since employers do not hire employees to commit torts.⁷⁷

The Court, when configuring the definitive rule that would be the controlling precedent regarding employer liability, took a few factors into account. First, the Court recognized that since *Vinson*, Congress had enacted amendments through the Civil Rights Act of 1991, modifying statutory grounds of other Supreme Court decisions while leaving *Vinson* intact.⁷⁸ Thus, the Court concluded that it was Congress’s intention that *Vinson* be ruling authority.⁷⁹ Second, the Court noted that the EEOC’s manuals and Title VII’s enforcement demonstrated Congress’s intent to recognize employers’ obligations to prevent harassment and give credit to employers who made reasonable efforts to do so.⁸⁰ Finally, the Court noted that Title VII also borrowed the avoidable consequences doctrine from tort law.⁸¹ Keeping these goals in mind, the Court constructed a rule that upheld *Vinson*’s agency principles, implemented incentives for employers to prevent sexual harassment, and required victims to mitigate harm.⁸² Therefore, the Court ruled, “[a]n employer is subject to vicarious liability to

74. *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992) (“The supervisor is deemed to act on behalf of the employer when making decisions that affect the economic status of the employee. From the perspective of the employee, the supervisor and the employer merge into a single entity.”); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) (“When a supervisor requires sexual favors as a *quid pro quo* for job benefits, the supervisor, by definition, acts as the company.”).

75. See *Faragher*, 524 U.S. at 785.

76. RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).

77. *Id.* § 219 cmt. e; see, e.g., *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1444 (10th Cir. 1997), vacated by 524 U.S. 947 (1998) (stating that sexual harassment “simply is not within the job description of any supervisor or any other worker in any reputable business”); *Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d 258, 261 (4th Cir. 1996) (“[I]llegal sexual harassment is . . . beyond the scope of supervisors’ employment.”).

78. *Faragher*, 524 U.S. at 804 n.4.

79. *Id.*

80. *Id.* at 806.

81. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (citing *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 n.15 (1982)).

82. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense....”⁸³ The defense requires the employer to prove, by a preponderance of the evidence, two elements: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”⁸⁴

B. Interpretation of “Opposition” Within the Circuits

In order to establish a *prima facie* case of retaliatory discrimination under section 2000e-3(a), a plaintiff must prove three elements: (1) that plaintiff engaged in protected activity, (2) that the plaintiff suffered an adverse employment action, and (3) that there was a causal link between the protected activity and the adverse employment action.⁸⁵ Section 2000e-3(a), the antiretaliation provision, specifically divides “protected activity” into two separate categories: the opposition clause and the participation clause.⁸⁶ Though the participation clause protects fewer activities of an employee than the opposition clause, it provides a stronger protection.⁸⁷ The purpose of the participation clause is to protect all avenues to the EEOC.⁸⁸ The participation clause grants an absolute privilege for filing a claim with the EEOC, and there is no requirement that the discrimination claim be meritorious, whereas the opposition clause only protects a petitioner who has a reasonable belief that the alleged conduct is illegal.⁸⁹ Most courts have interpreted the participation clause to require that an employee file a claim, while the opposition clause protects less formal complaints.⁹⁰

In 1998, the EEOC issued a Compliance Manual to provide guidance as to what it considered “opposition.”⁹¹ The manual stated that opposition

83. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

84. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

85. *See, e.g.,* *Lang v. Ill. Dep’t of Children & Family Servs.*, 361 F.3d 416, 418 (7th Cir. 2004); *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1143–44 (9th Cir. 2003).

86. *Laughlin v. Metro. Wash. Airports Auth.*, 952 F. Supp. 1129, 1133 (E.D. Va. 1997).

87. *Croushorn v. Bd. of Trs. of Univ. of Tenn.*, 518 F. Supp. 9, 21 (M.D. Tenn. 1980).

88. *Id.* at 22.

89. *Id.* at 21.

90. *See, e.g.,* *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989).

91. EEOC COMPLIANCE MANUAL § 8-IIB(1) (May 20, 1998).

existed when an employee “communicates to his or her employer... a belief that its activity constitutes a form of employment discrimination that is covered by any of the statutes enforced by the EEOC.”⁹² Despite this guidance, courts have differed in interpreting the communication aspect of opposition.⁹³ Some courts have interpreted communication liberally, whereas others have interpreted it more stringently. For example, in *Bruno v. RIH Acquisitions MS I, LLC*, the United States District Court for the Northern District of Mississippi held that an employee’s statement, “that’s not right,” in response to his employer’s refusal to hire an applicant because he was too old, was protected activity.⁹⁴ In *Rachel-Smith v. FTData, Inc.*, however, Smith’s employer made sexual advances toward her on multiple occasions and would call her into his office presumably for work-related matters but instead attempted to have sex with her.⁹⁵ Despite her refusals and emails requesting that he stop, the United States District Court for the District of Maryland held that Smith’s communication fell short of the standard for protected activity under the opposition clause.⁹⁶ Strictly interpreting the EEOC manual, the court stated, “[t]o the extent that Plaintiff communicated only that McLallen should cease his sexual advances, Plaintiff failed to communicate that she was requesting this because she believed his advances to be illegal.”⁹⁷

Besides the communication aspect, courts are split as to what activities are regarded as opposition. One interpretation requires a more active approach to opposition that falls in line with *Rachel-Smith*.⁹⁸ For example in *Bell v. Safety Grooving & Grinding, LP*, two employees, Fetty and Bell, began a romantic relationship together and lived with one another.⁹⁹ Bell complained to co-workers about Safety’s decision to hire male employees to work overtime when Fetty could do the same work for less money, and Fetty filed a gender discrimination charge against Safety with the EEOC.¹⁰⁰ Bell’s supervisor instructed him to tell Fetty to “back off,” to which Bell

92. *Id.*

93. *Bell v. Safety Grooving & Grinding, LP*, 107 Fed. App’x 607, 610 (6th Cir. 2004).

94. *Bruno v. RIH Acquisitions MS I, LLC*, 530 F. Supp. 2d 819, 821 (N.D. Miss. 2008).

95. *Rachel-Smith v. FTData, Inc.*, 247 F. Supp. 2d 734, 741 (D. Md. 2003).

96. *Id.* at 748.

97. *Id.*

98. *See, e.g., Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 702 (3rd Cir. 1995) (“A general complaint of unfair treatment does not translate into a charge of illegal *age* discrimination.”); *Pawlak v. Seven Seventeen HB Phila. Corp.* No. 2, No. Civ.A.99-CV-5390, 2005 WL 696878, at *9 (E.D. Pa. Mar. 24, 2005) (stating that plaintiff’s memorandum complained of the negative business ramifications as a result of employer’s activities and not specifically against the racial discrimination).

99. *Bell v. Safety Grooving & Grinding, LP*, 107 Fed. App’x 607, 608 (6th Cir. 2004).

100. *Id.*

responded he would not, suggesting that the supervisor tell Fetty himself.¹⁰¹ Bell alleged that the employer decreased his overtime and declined to rehire him after a seasonal layoff because of his relationship with Fetty.¹⁰² The Sixth Circuit held that despite his refusal to relay the message and despite his complaints to other workers regarding the labor issue, opposition demanded “active, consistent, ‘opposing’ activities to warrant [Title VII] protection against retaliation.”¹⁰³

In contrast to *Bell*, *McDonnell v. Cisneros* recognized “passive opposition.”¹⁰⁴ The employer in *McDonnell* ordered a supervisor to prevent his subordinates from filing discrimination claims.¹⁰⁵ The plaintiff did not communicate opposition but rather failed to follow the order.¹⁰⁶ In response, the employer reassigned the plaintiff because of his inability to control his subordinates.¹⁰⁷ The Seventh Circuit held that the failure to follow a command constituted “passive opposition” and thus a protected activity.¹⁰⁸ The court opined that to hold otherwise would allow employers to obtain immunity from the retaliation statute by directing their subordinates to prevent other workers from complaining about discrimination.¹⁰⁹

In the context of this discord between the courts, the Supreme Court through *Crawford* sought to determine the standard by which the courts should interpret section 2000e-3(a). In addition to defining the opposition clause, the *Crawford* Court restrained itself from disrupting the incentive scheme produced by *Faragher* and *Ellerth*.¹¹⁰ Therefore, the Court’s objective was to define “oppose” and avoid nullifying an employer’s

101. *Id.*

102. *Id.* at 609.

103. *Id.* at 610 (citing *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579–80 (6th Cir. 2000) (holding that sending numerous letters to employer objecting to discriminatory hiring practices constituted opposition); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989) (holding that sending one letter contesting a single decision to employer’s human resources department did not constitute opposition)).

104. *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996); *see also* *Tidwell v. Am. Oil Co.*, 332 F. Supp. 424, 433, 436 (D. Utah 1971) (holding that plaintiff was protected by statute for failing to modify minority races’ applicants test scores).

105. *McDonnell*, 84 F.3d at 258.

106. *Id.*

107. *Id.*

108. *Id.* at 262.

109. *Id.*

110. *Crawford v. Metro. Gov’t of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 852 (2009).

motivation to obtain an affirmative defense.¹¹¹

IV. THE COURT'S DECISION

The United States Supreme Court's decision in *Crawford* is significant because it was the first time the Supreme Court defined "oppose" in the context of Title VII.¹¹² More importantly, this case involved retaliation against an employee who did not voluntarily report discrimination.¹¹³ The defendant argued for a strict interpretation of the Title VII provision and asserted that an adverse decision would conflict with prior Supreme Court precedent regarding the public policy of Title VII.¹¹⁴ In the *Crawford* opinion, the Court first defined "oppose" and articulated types of actions that would fall under the term.¹¹⁵ The Court then discussed the public policy behind the definition given.¹¹⁶

A. What is the Definition of "Oppose?"

The Supreme Court, when first determining the meaning of "oppose" as used in the statute, looked to the dictionary.¹¹⁷ The Court found that "oppose" means "'to resist or antagonize... ; to contend against; to confront; resist; withstand.'"¹¹⁸ The Court concluded, however, that "'RESIST frequently implies more active striving than OPPOSE,'"¹¹⁹ and that "oppose" means "'to be hostile or adverse to, as in opinion.'"¹²⁰ Once it settled on a definition, the Court immediately concluded that the description Crawford gave the investigator, on its face, was a negative report of sexually abhorrent behavior toward Crawford by Hughes, and according to Crawford, the statement antagonized her employer to dismiss her mendaciously.¹²¹ Under this conclusion, the Court further explained that Crawford's depiction of Hughes' treatment would suffice "in the minds of

111. *See id.*

112. *See id.* at 850.

113. *See id.* at 849–50.

114. *Id.* at 851–52.

115. *Id.* at 850–51.

116. *Id.* at 851–52.

117. *Id.* at 850.

118. *Id.* (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 1710 (2d ed. 1958)).

119. *Id.* (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 1710 (2d ed. 1958)).

120. *Id.* (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1359 (2d ed. 1987)).

121. *Id.* at 850–51.

reasonable jurors as ‘resist[ant] or antagoni[stic].’”¹²²

The defendant asserted that the EEOC’s Compliance Manual repeatedly used active verbs to describe opposition conduct, such as “‘threatening’ to file a charge or complaint; ‘complaining’; ‘protest[ing]’; ‘picketing’; ‘refusing’ to obey an order; and ‘requesting’ reasonable accommodation.”¹²³ The defendant further argued that, as the Sixth Circuit held, Crawford answering questions was not sufficient enough “to put an employer on notice that an employee ‘opposes’ an unlawful employment practice,”¹²⁴ and that there was no indication whether Crawford actually opposed Hughes’ conduct because her defensive responses were also inappropriate.¹²⁵

Contrarily, the Court explained that the EEOC guidelines stated, “[w]hen an employee communicates to her employer a belief that the employer has engaged in... a form of employment discrimination, that communication... constitutes the employee’s *opposition* to the activity.”¹²⁶ As for Crawford’s reactions to Hughes’ behavior, the Court dismissed the argument because the Court was reviewing the District Court’s grant of Metro’s motion for summary judgment, and thus, all the facts were taken in the light most favorable to Crawford.¹²⁷ In any case, Crawford did not indicate that Hughes’ actions were anything but repugnant to her.¹²⁸

At this point the Court addressed *Bell*. The Court held that although the Sixth Circuit adopted the standard of opposition that demands “‘active, consistent opposing activities to warrant... protection against retaliation, and that an employee must instigate or initiate a complaint to be covered,’” those requirements are merely examples of opposition and are not the limits.¹²⁹ The Court declared that “oppose” extends beyond active conduct and incorporates when one would “naturally use the word to speak of

122. *Id.* at 851.

123. Brief for the Respondent at 38, *Crawford v. Metro. Gov’t of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846 (2009) (quoting EEOC COMPLIANCE MANUAL § 8-IIB(2) (May 20, 1998)).

124. *Id.* at 30.

125. *Id.* at 1–2 (stating that Crawford responded to Hughes’ comments and actions by saying “bite me” and “flipping him a bird.”).

126. *Crawford*, 129 S. Ct. at 851 (quoting Brief for United States as Amicus Curiae Supporting Petitioner at 9, *Crawford v. Metro. Gov’t of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846 (2009)).

127. *Id.* at 851 & n.2.

128. *Id.* at 851.

129. *Id.* (quoting *Bell v. Safety Grooving & Grinding, LP.*, 107 Fed. App’x 607, 610 (6th Cir. 2004)).

someone who has taken no action at all to advance a position beyond disclosing it.”¹³⁰ Specifically, the Court referred to the *McDonnell* holding and found that opposition existed, albeit passive, when an employee failed to follow a supervisor’s order to fire an employee based on discriminatory principles.¹³¹ The Court extended the *McDonnell* reasoning to conclude that a person opposes conduct by answering someone else’s inquiries just as if the testifier instigated the discussion and that it is imbalanced to hold that an employee is protected by reporting discrimination on her own accord “but not [when she] reports the same discrimination in the same words when her boss asks a question.”¹³² The Court then went on to discuss whether adopting passive opposition was contrary to the incentive scheme created by *Ellerth* and *Faragher*.

B. Does Liability for Passive Opposition Upset the Incentive Scheme?

The defendant argued that non-active opposition contradicted the holdings in *Faragher* and *Ellerth*, which encourage preventive and corrective measures on the part of employers.¹³³ If the standards for a retaliation claim are lowered then it becomes an “easy charge” when an employee is adversely affected by a preventive/corrective internal investigation, and employers as a result will fail to inquire into discrimination allegations.¹³⁴

The Supreme Court, however, rejected this argument, stating that this reasoning discounts the incentive for employers to investigate that stems from *Ellerth* and *Faragher*.¹³⁵ Though there is not an affirmative defense when a tangible employment action is taken, the Court explained that an employer has a defense when no tangible employment action is taken if it has “exercised reasonable care to prevent and correct” discriminatory actions and the employee failed to take advantage of the employer’s preventative and corrective measures.¹³⁶ The Court then cited to the

130. *Id.* The Court exemplified its position by stating that many opposed slavery before emancipation and currently oppose capital punishment without “writing public letters, taking to the streets, or resisting the government.” *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 851–52.

134. *Id.* at 852.

135. *Id.*

136. *Id.* (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998)).

plaintiff's brief, which referenced studies suggesting that, since *Faragher* and *Ellerth*, many employers have adopted or strengthened procedures regarding discriminatory conduct.¹³⁷ The Court dismissed the defendant's argument because it was unlikely that an employer might one day want to dismiss an employee who might charge discrimination linked to an internal investigation; such an unlikelihood would not attenuate the incentive provided by the *Faragher* and *Ellerth* affirmative defense.¹³⁸

Furthermore, the Court reasoned that following the Sixth Circuit's ruling would undermine the policy underlying *Faragher* and *Ellerth* as well as the statute's "'primary objective of avoiding harm' to employees."¹³⁹ The Court deduced that if the law allowed an employer to penalize an employee for cooperating in an internal investigation without remedy, then employees would remain silent regarding Title VII claims, especially given that fear of retaliation is the dominating reason for employees not reporting discrimination.¹⁴⁰ The Court explained that following the Sixth Circuit's reasoning would create a "Catch-22:" canny employers could escape liability entirely by commencing inquiries and dismissing cooperative employees, while prudent employees who would remain silent would fail the second element of an employer's *Faragher* and *Ellerth* affirmative defense.¹⁴¹

The defendant further argued that requiring an individual to take active steps to oppose discrimination correlates with the "requirement that an employee take advantage of workplace procedures to actively report alleged discrimination" prescribed by the Court in *Faragher* and *Ellerth*.¹⁴² The Court rebuffed this argument because an employee's mitigation requirement applied solely to those who endured discrimination and had the opportunity to rectify it by "tak[ing] advantage of any preventive or corrective opportunities provided by the employer," which is based on the principle that victims in general have a duty to mitigate damages.¹⁴³ Furthermore, the

137. *Id.* (citing Brief for the Petitioner at 25 n.31, *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846 (2009) ("A 2001 workplace survey of over 200 human resource executives conducted by a national law firm found that 82% of the respondents provided sexual harassment prevention training for their supervisors, a sharp increase from the 34% that provided this type of training in 1985.")).

138. *Id.*

139. *Id.* (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998)).

140. *Id.* (citing Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005)).

141. *Id.*

142. Brief for the Respondent at 27, *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846 (2009).

143. *Crawford*, 129 S. Ct. at 853 n.3 (quoting *Faragher*, 524 U.S. at 807).

Court reasoned that extending the mitigation requirement would consistently fail, because the employees facing retaliation for reporting discrimination on the behalf of others would have suffered no harm until retaliated against.¹⁴⁴ The employee is not a victim until she suffers the harm that she is required to mitigate, therefore requiring the employee to claim retaliation before retaliation occurs.¹⁴⁵

C. Concurring Opinion

Two justices wrote separately in a concurring opinion, agreeing with the majority that the opposition clause protects employees who testify about unlawful conduct in an internal investigation but disagreeing with the holding that the clause protects non-active opposition.¹⁴⁶ The concurring opinion relied, as did the majority, on the EEOC guideline which states that an employee's communication of discrimination to an employer almost always constitutes opposition to the conduct.¹⁴⁷ The concurring justices agreed that "oppose" can mean and is used to express hostility of opinion, but that the primary definition of the term required "conduct that is active and purposive."¹⁴⁸ Furthermore, the concurring justices noted that all of the remaining conduct protected by the retaliation clause "requires active and purposive conduct,"¹⁴⁹ and the fact that "several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."¹⁵⁰ Specifically, the justices feared that an interpretation of the opposition clause that protected passive conduct could have negative repercussions.¹⁵¹ For example, the justices gave the scenario that an employee may allege that she expressed opposition to a co-worker at the "proverbial water cooler" and was overheard by another.¹⁵² The opinion noted that some courts have held that an employee alleging retaliation can prove causality merely from temporal proximity of the employer's knowledge of the protected activity and the detrimental employment

144. *Id.*

145. *Id.*

146. *Id.* at 853, 855 (Alito, J., concurring) (noting that whether the opposition clause protects employees who do not communicate their views with purposive conduct was not at issue in the case at hand).

147. *Id.* at 853.

148. *Id.* at 853–54.

149. *Id.* at 854; see 42 U.S.C. § 2000e-3(a) (2006) (stating that a person must have "made charge, testified, assisted or participated in any manner in an investigation").

150. *Crawford*, 129 S. Ct. at 854 (Alito, J., concurring) (quoting *S. D. Warren Co. v. Me. Bd. of Envtl. Protection*, 547 U.S. 370, 378 (2006)).

151. *Id.*

152. *Id.*

action.¹⁵³ Thus, an employee may assert a *prima facie* retaliation case based solely on the fact that the employer was indirectly informed or cognizant of the employee's position prior to any discipline.¹⁵⁴ Lastly, the concurring justices pointed out that the number of retaliation claims filed with the EEOC has escalated and that the commodious interpretation of protected opposition activity will cause the number to further rise.¹⁵⁵ The concurrence concluded that it would have been sufficient for the Court to confine its holding to an employee who testified about unlawful conduct in an internal investigation.¹⁵⁶

V. ANALYSIS

This Note argues that the *Crawford* Court reached the correct result, but that it was unnecessary to interpret the opposition clause so broadly. First, the Court could have upheld an "active opposition" interpretation and reconciled *Bell*, *McDonnell*, and the EEOC Compliance Manual. Second, the Court's interpretation is inconsistent with the remainder of Title VII. Finally, the Court's holding runs counter to the employer incentives created in *Faragher* and *Ellerth*. Though the Court correctly found that *Crawford*'s conduct was protected by the opposition clause, such an expansive holding will cause unintended consequences.

A. Active Opposition

The Supreme Court erred in refusing to adopt "active opposition." The Court's adopted definition of "opposition" is "to be hostile or adverse to, as in opinion."¹⁵⁷ The Court also stated that it heavily relied on *McDonnell*'s "passive opposition" and the EEOC's Compliance Manual, stating that almost any communication from an employee regarding harassment will constitute opposition.¹⁵⁸ The Court, however, misinterpreted the EEOC's Compliance Manual. The holding by the *Rachel-Smith* court is more accurate, since the EEOC guideline specifically states that the

153. *Id.* at 854–55 (citing *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001); *Gorman-Bakos v. Cornell Coop. Extension of Schenectady County*, 252 F.3d 545, 554 (2d Cir. 2001); *Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390, 1395 (10th Cir. 1997); *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1458 (7th Cir. 1994)).

154. *Id.* at 855.

155. *Id.*

156. *Id.*

157. *Id.* at 850 (majority opinion).

158. *Id.* at 851.

communication must be because the employee believed that the employer's behavior was illegal in order to constitute opposition.¹⁵⁹ To hold that almost all communication regarding harassment is opposition is inaccurate. Furthermore, the concurring opinion was correct by taking an active opposition stance. The concurrence noted that all of the examples of opposition in the manual were active, and "[t]hat several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."¹⁶⁰ Thus, the Court should have adopted an active opposition interpretation.

Moreover, the Court could still have held that failing to act is protected as active opposition, thus reconciling *McDonnell* and *Bell*. An employee who fails to follow a discriminating directive from a superior, as in *McDonnell*, actively opposes the employer.¹⁶¹ Failure to act is an affirmative, conscious decision on the part of the employee and implicitly communicates opposition to the employer when he discovers that his orders were not followed. Inaction is purposive and creates tangible consequences, whereas the "hostility in opinion" definition does not manifest any results that would indirectly communicate opposition to an employer. Therefore, an employee who refuses to follow a discriminatory order indirectly, but purposively, communicates his opposition to his employer, thus reconciling *McDonnell*, *Bell*, and the EEOC Compliance Manual. As for Crawford's communication, the defendant argued that her testimony never specifically stated that she opposed Hughes' behavior, thus she was not communicating the conduct because she believed it was illegal, as required by the EEOC manual.¹⁶² This argument, however, fails even under this Note's strict interpretation. Crawford knew that the internal investigation was for sexual harassment complaints and that the testimony she gave would likely have adverse effects on Hughes.¹⁶³ Therefore, because she knew that her testimony reported illegal conduct, her communication opposed the conduct. Thus, the Court could have upheld a strict interpretation of the opposition clause and still have reconciled the circuits along with the EEOC's manual.

159. *Rachel-Smith v. FTData, Inc.*, 247 F. Supp. 2d 734, 748 (D. Md. 2003).

160. *Crawford*, 129 S. Ct. at 854 (Alito, J., concurring) (quoting *S. D. Warren Co. v. Me. Bd. of Envtl. Protection*, 547 U.S. 370, 378 (2006)).

161. *See McDonnell v. Cisneros*, 84 F.3d 256, 258 (7th Cir. 1996).

162. *See* note 125 and accompanying text.

163. *Crawford*, 129 S. Ct. at 849 (majority opinion).

B. Title VII: Uniform Standard

In *Crawford*, the Supreme Court should have applied racial harassment standards to sexual harassment claims. The Court noted in *Faragher* that the circuit courts have often drawn on cases involving racial harassment standards to develop sexual harassment standards, thereby creating a uniform standard in harassment cases.¹⁶⁴ In *Harris v. Forklift Systems, Inc.*, the Supreme Court, relying on racial harassment standards, held that a hostile work environment for sexual harassment must be both objectively and subjectively offensive—one that a reasonable person would find hostile and one that the victim perceived to be hostile.¹⁶⁵ In *Ellerth*, the dissent opined that the Court, when creating the incentive scheme to prevent sexual harassment, should have adopted racial harassment standards.¹⁶⁶ The same holds true in *Crawford*. The *Rogers* court held that a mere utterance of a racial epithet would not rise to the level of racial harassment to create a hostile work environment.¹⁶⁷ This standard has been true regarding sexual harassment.¹⁶⁸ Thus, in opposition cases, a mere utterance of disapproval should not rise to the level of opposition required for protection.¹⁶⁹ The Court, as it did in *Harris*, should adopt an objective and subjective standard for opposition, so that a reasonable person must find the employee's conduct to be opposition, and the employee must have intended to oppose the employer's actions.¹⁷⁰ The *Crawford* Court hinted at an objective standard when it stated that "Crawford's description of the louche goings-on would certainly qualify in the minds of reasonable jurors as 'resist[ant]' or 'antagoni[stic]' to Hughes's treatment."¹⁷¹ Moreover, by having an objective standard, courts would be able to weed out more claims through summary judgment. If opposing behavior were held to an objective standard, then the employee's actions would need to rise to a level that a reasonable employer would find to be opposition. If the behavior would not reasonably be seen as opposition, then a plaintiff would not be able to prove cause, thus more cases could be eliminated in summary judgment stages.

164. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 & n.1 (1998).

165. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 19, 21–22 (1993).

166. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 774 (1998) (Thomas, J., dissenting).

167. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *superseded by statute*, Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 109, *as recognized in* *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984).

168. *Faragher*, 524 U.S. at 786–87.

169. *See Rogers*, 454 F.2d at 238.

170. *See Harris*, 510 U.S. at 21–22.

171. *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 851 (2009).

The *Crawford* Court mentioned in dicta that many people opposed slavery before emancipation.¹⁷² In that sense, one may interpret that the Court meant that people's opinions against slavery constituted opposition. Under the *Crawford* holding, cases involving mental opposition against slavery would survive summary judgment but would fail to prove cause. Thus, in using an objective standard of opposition, frivolous cases would more readily be dismissed.

Finally, there is the defendant's argument that such a liberal interpretation of opposition would render the participation clause superfluous: "[u]nder Ms. Crawford's paradigm, there would be no need for the participation clause because 'opposition' would be defined so broadly as to include the most casual conversation between a potential plaintiff and another."¹⁷³ Although the Supreme Court never addressed this argument, this Note argues it is valid. The purpose of the participation clause was to provide absolute protection for employees who file with the EEOC whereas the opposition clause was to provide less.¹⁷⁴ Thus, if the opposition clause allows employees to be protected for virtually any conduct, the participation in an EEOC's investigation would certainly be considered opposition to any employer's conduct. Therefore, the defendant was correct in asserting that with the Court's decision, the participation clause has become irrelevant.

C. Employer's Incentives

The *Crawford* decision will likely cause the number of retaliation claims to rise because it provides employers a negative incentive to investigate sexual harassment claims. Title VII's primary role is to encourage forethought by employers to prevent harm and allow employees to correct harm without filing charges.¹⁷⁵ *Crawford*'s concurring opinion notes that the number of retaliation charges filed with the EEOC doubled between 1992 and 2007 and that the broad interpretation of protected opposition will cause the claims to proliferate.¹⁷⁶ Furthermore, the concurrence's proverbial water cooler example exhibits how a mere comment describing

172. *Id.*

173. Brief for the Respondent at 25, *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846 (2009).

174. *Blizzard v. Newport News Redevelopment & Hous. Auth.*, 670 F. Supp. 1337, 1344 (E.D. Va. 1984).

175. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998).

176. *Crawford*, 129 S. Ct. at 855 (Alito, J., concurring).

disagreement to a co-worker could turn into a retaliation claim for employers because the causal element can be proven with temporal proximity.¹⁷⁷

Ultimately, *Crawford* will affect how employers conduct internal investigations. The Court erred by quickly dismissing the defendant's argument that the interpretation will undercut the *Faragher* and *Ellerth* decisions, believing that the affirmative defense available for employers was sufficient.¹⁷⁸ One commentator noted that the Supreme Court failed to address another issue: Does every response to an employer's internal investigation of sexual harassment constitute opposition?¹⁷⁹ The plaintiff in *Crawford* gave a detailed testimony of the alleged sexually harassing behavior, so the Court did not need to delve into the question.¹⁸⁰ But where an employee's response is vague or ambiguous, there is no guidance as to whether an employer is required to investigate further.¹⁸¹ If the employer does not, it could be precluded from using the *Faragher* and *Ellerth* affirmative defense.¹⁸² Contrarily, at what point is the employee protected by *Crawford*?¹⁸³

Despite the overly broad decision in *Crawford*, some courts have declined to utilize *Crawford* in such a manner. In *Pitrolo v. County of Buncombe, N.C.*, the Fourth Circuit held that *Crawford* did not apply when an employee complained to her father because the EEOC manual requires communication to the employer.¹⁸⁴ Thus, the court decided not to give deference to *Crawford*'s definition of opposition.¹⁸⁵ Likewise, in *Edwards v. Hyundai Motor Manufacturing Alabama LLC*, where an employee answered a nurse's questions regarding sexual harassment and subsequently was not rehired after medical leave, the District Court for the Middle District of Alabama declined to apply *Crawford*'s extension because there was no evidence that the nurse forwarded the complaints to a supervisor or

177. *Id.* at 854.

178. *Id.* at 852 (majority opinion).

179. Paul I. Weiner, *A Brief Treatise on Punitive Damages Under Title VII and Will the Supreme Court's Recent Holding in Crawford End Up Derailing the Ellerth/Faragher Affirmative Defense in Sexual Harassment Cases?*, 799 PLI/ Lit 125, 136 (2009).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Pitrolo v. County of Buncombe, N.C.*, No. 07-2145, 2009 WL 1010634, at *3 & n.6 (4th Cir. Mar. 11, 2009).

185. *See Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 850 (2009).

anyone else in the chain of command.¹⁸⁶

VI. CONCLUSION

The Supreme Court correctly held that Title VII's antiretaliation provision protected Crawford from her employer's dismissal. The Court, however, took unnecessary steps and made unnecessary determinations to protect Crawford and created a disconcerting, overly broad interpretation of the opposition clause. The full effects of the *Crawford* decision have yet to manifest, but it is likely that the number of EEOC claims will increase and employer liability will accelerate as well.

186. *Edwards v. Hyundai Motor Mfg. Ala., LLC*, No. 2:07cv908-MHT, 2009 WL 1257164, at *2 (M.D. Ala., May 5, 2009).

